

**Preston|Gates|Ellis &
Rouvelas|Meeds LLP**

MARTIN L. STERN
DIRECT DIAL: (202) 662-8468

June 6, 2002

BY HAND

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Presentation in CS Docket No. 01-290

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, the Broadband Service Providers Association (BSPA) submits this *ex parte* presentation in the above-captioned proceeding.

As reflected in its comments in the captioned proceeding, BSPA supports extension of the sunset provision of Section 628(c) applicable to exclusive contracts involving cable-affiliated, satellite-delivered programming. In its comments, BSPA also raised concerns regarding the availability to competitive MVPDs, of cable affiliated, terrestrial programming, and asked the Commission to take steps to address this issue.

We are hopeful that, in the exclusivity extension Report and Order, the Commission affirmatively recognizes the extensive record evidence on the importance of the availability of cable-affiliated, terrestrial programming to competition in the MVPD market. While BSPA continues to believe that Section 628(b) can reasonably be construed to cover such programming, we recognize that others disagree. Accordingly, we ask that the Commission also make clear that, given its uncertainty as to whether 628(b) reaches access to terrestrial programming, the Commission would be unlikely, in the absence of Congressional clarification on the scope of Section 628, to commence a proceeding to address whether the program access rules should be expanded to cover the availability of terrestrial programming. Also attached to this *ex parte*, are talking points addressing this issue.

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cc: Susan Eid
Stacy Robinson
Susanna Zwerling
Catherine Crutcher Bohigian

Broadband Service Providers Association (BSPA)
Program Access Sunset Extension And Access To Terrestrial Programming

- BSPA supports extension of the Sunset Provision of Section 628(c)(5) applicable to exclusive contracts.
 - Competitive access to programming is critical and requires continued protection.
 - Current industry consolidation amplifies potential issues.
- Fair and equal access to programming is critical element to effective long term MVPD competition, key policy goal of 1992 Cable Act and Telecom Act of 1996.
 - Clearly recognized for satellite-delivered programming, as reflected in Section 628(c)(2) (“minimum content of regulations”).
 - Equally important for programming delivered to MVPDs via other modes, as demonstrated by numerous parties.
- Protections afforded by Program Access provisions should be technology-neutral, and should not depend on programming’s mode of delivery to MVPDs.
 - Sections 628(a) and (b) were intended as general principle to protect competition.
 - Terrestrial delivery is a major technology shift that has occurred since the original provisions were passed.
 - Distribution and delivery technologies will continue to migrate. Emerging technologies that may need consideration may include VOD, ITV, and Streaming Video.
- Differing views exist as to whether FCC has current authority to apply the Program Access Rules to terrestrial-delivered programming, though BSPA believes that Section 628(b) can fairly be read to cover the denial of programming by cable-affiliates, regardless of delivery mode, where purpose or effect is to significantly hinder or prevent MVPD’s ability to compete.
 - The FCC has expressed concern about extending its authority.
 - Some congressional leaders feel authority already exists.
 - Both have acknowledged concern over the potential anti-competitive issues.
- FCC in its Exclusivity Sunset Report and Order should acknowledge these continuing issues and establish framework for their resolution.
 - Continuing industry consolidation and potential opportunities for companies with significant market power to limit competition through exclusive or discriminatory access to programming.
 - The need, from policy perspective, for Program Access rules to be independent of technology employed for program delivery to distributors.
 - The potential need for Congressional clarification of the broader intent of the current Section 628 provisions and the FCC’s authority to protect MVPD competition by requiring access to cable-affiliated programming, regardless of mode of delivery.
 - The continued importance of sustaining and developing competition in the MVPD market beyond the current dominant incumbent MSO’s and satellite providers.